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ABSTRACT

Recourse to the courts for resolution of conflicts has become increasingly frequent, particularly in matters concerning American Indians. Important to this upsurge is the commitment to Indian sovereignty and the awareness among Indians that their rights can be asserted and established in courts. The issues of Indian self-determination and tribal sovereignty are at the forefront of almost all Indian litigation, including that involving tribal jurisdiction, taxation, and natural resource questions. Tribal sovereignty is the ability of reservation Indians to make, enforce, and be ruled by their own laws. In the past year Supreme Court actions in the Wheeler and Martinez cases affirmed tribal rights to apply their own laws to tribal members. The Oliphant case denied Indians criminal jurisdiction over non-Indians for crimes committed within reservation boundaries. Taxation cases have included the authority of states and federal government to tax Indians as well as the taxing authority of tribes. Natural resources cases based on the tribal rights to manage, develop and conserve their own assets have been heard in such areas as water rights, hunting and fishing regulations, and property damage claims. This paper describes individual cases, summarizes trends, and comments on the future conduct of Indian litigation. (Author/DS)

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I. Overview of Indian Litigation

The judicial process constitutes one of the basic means in the United States through which disputes between individual parties are resolved and through which the legal rights of the parties are ascertained, established and vindicated. In virtually all areas of American society, recourse to the courts for resolution of conflicts has become increasingly frequent in recent years. This increase in litigation has been particularly evident in matters concerning American Indians. There are a number of considerations, legal, political and economic which may help to explain the increase in litigation with specific respect to Indians.

From the Indian perspective, successful and well-publicized cases such as the fishing rights cases in Washington state and the land claims cases brought by eastern tribes have undoubtedly contributed to the tendency to utilize the judicial process in the hope of gaining similar victories. The growing awareness of the importance to the Indian community of reservation resources such as water, coal, timber, and fish and wildlife have also been important to the attempt to protect Indian rights to these assets in court. These resources are of obvious importance to the present and future economic well-being of Indian people. The most important factor in the

upsurge of Indian litigation, however, is the widespread and growing commitment throughout the Indian community to Indian sovereignty and an increasing awareness among Indians of how Indian rights can be asserted and established in courts. The issues of Indian self-determination and tribal sovereignty are at the forefront of almost all Indian litigation including that involving tribal jurisdiction, taxation, or natural resource questions. Thus, Indians have had frequent recourse to courts in order to assert and to establish the scope of the principle of Indian self-determination, which can be broadly defined as the right of Indian people to control their own lives and destinies.

The opponents of Indians in judicial proceedings bring a different perspective to bear upon Indian litigation. In many cases, state governments (a frequent opponent of Indians) claim to be interested in factors such as broadening their tax base, conserving natural resources, securing water in areas in which water is scarce, and extending the reach of state law to reservations, particularly in matters involving non-Indians on the reservation. The "Indian backlash" which has caused a great deal of justifiable concern to the Indian community over the past year, is also an important backdrop to some of the opposition to Indians in judicial proceedings.

The following "Review of Developments in Indian Law" traces the developments in the law and the interplay of the factors discussed above in three broad areas: Tribal Sovereignty, Taxation, and Natural Resources. With respect to each area, we discuss the holdings and implications of several important cases during the past year and we present our analysis of the broad trends which appear to be developing in those areas. With respect to each area, we find the trend of judicial decision to be somewhat mixed from the standpoint of Indian interests. After our discussion of the three areas, we present a brief general summary of trends in litigation and also offer comments on the future conduct of Indian litigation.

II. Tribal Sovereignty: The Ability of Reservation Indians to Make, Enforce, and be Ruled by Their Own Laws

A. Supreme Court Cases

Any discussion of the current status of tribal sovereignty must begin with the Supreme Court of the United States important decisions this term in the Oliphant, Wheeler and Martinez cases.[1/]

1/ In addition to the three cases discussed in the text, the Supreme Court rendered a decision last term in another

(Cont'd.)

In Oliphant v. Suquamish Indian Tribe, 46 U.S.L.W. 4210 (March 6, 1978), the Supreme Court held that Indian tribal courts do not have criminal jurisdiction to prcsecute and punish non-Indians for offenses committed on a reservation. The case arose on the Port Madison Reservation near Seattle, Washington, and involved two individuals who were arrested by Suquamish tribal authorities for assault, injury to tribal property, and resisting arrest. In a 6-2 opinion, written by Justice Rehnquist, the Supreme Court held that no specific statute or treaty provision authorized the Suquamish tribal court to exercise criminal jurisdiction over non-Indians and that, therefore, the Tribe lacked criminal jurisdiction over non-Indians.

1/ (Cont'd.)

Indian case, United States v. John, 46 U.S.L.W. 4806 (June 23, 1978). In John the Supreme Court held that the Mississippi Choctaw Indian Reservation constituted "Indian country" within federal jurisdiction and that federal courts, but not state courts, had jurisdiction over a prosecution for assault with intent to kill allegedly committed by an Indian on the Reservation. The John decision is favorable to Indian interests because it recognizes the existence of an Indian reservation under federal supervision in the face of a challenge thereto by the state. The specific facts of this case concerning the Mississippi Choctaw, however, limit its applicability to other tribes.

The Oliphant decision was disappointing both in its conclusion and in the legal reasoning underlying it. Throughout the Indian community and elsewhere, it was widely feared that the decision would lead to a breakdown of law enforcement on reservations. In an opinion of April 10, 1978, Solicitor Krulitz of the Department of the Interior attempted to spell out the alternative ways that law enforcement on Indian reservations could be provided, in an effort to fill the void in the wake of Oliphant. It remains to be seen whether the Solicitor's conclusions will be implemented and whether they will result in adequate law enforcement.

It should be noted that in the Oliphant case, the question of civil jurisdiction is left undecided and, indeed, unmentioned in the opinion. This very important issue, which includes the power to tax non-Indians, is already in litigation with preliminary mixed results as discussed below.

Two weeks later, after Oliphant, the Supreme Court decided United States v. Wheeler, 46 U.S.L.W. 4243 (March 22, 1978). In Wheeler, the Court held that both the Tribe and the federal government could prosecute an Indian for the same offense without violating the double jeopardy clause of the United States Constitution.

The Court held that a tribe's authority to punish its own members (as opposed to the non-Indians involved in Oliphant) was derived from its original sovereign power of self-government, and it further held that this authority was not given up when the tribe assumed "dependent status." Therefore, the Court concluded that the tribe and the United States were "separate sovereigns" in this respect and could each lawfully punish the tribal members.

To the extent that it upholds a tribe's sovereignty over its own members, the decision in Wheeler is favorable. However, the Court in Wheeler repeated some of the disturbing ideas which it had expressed earlier in the month in Oliphant. One troubling statement in Wheeler is that tribes have lost sovereignty in matters "involving the relations between an Indian tribe and non-members of the tribe." This raises the question of the extent of the tribe's civil jurisdiction over both non-Indians and also over Indian residents who are not tribal members.

The third case which raises issues important to tribal sovereignty is Santa Clara Pueblo v. Martinez, 46 U.S.L.W. 4412 (May 15, 1978). In Martinez, the Supreme Court

held that neither Indian tribes nor tribal officials may be sued in federal court for alleged violations of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1303, except for suits against tribal officials for writs of habeas corpus specifically allowed by 25 U.S.C. § 1303. Since it has never been questioned that the ICRA did not allow state court suits, the only courts available now for protecting individual rights guaranteed by the ICRA are, by the Supreme Court's decision, tribal courts.

Martinez involved an ordinance of the Santa Clara Pueblo, New Mexico, that permits the tribal enrollment of children of marriages in which only the father is a tribal member but that prohibits the enrollment of children of marriages in which only the mother is a tribal member. Mrs. Martinez and her children brought suit against the Tribe and the tribal governor arguing that this ordinance constituted a violation of equal protection under the ICRA.

With respect to the suit against a tribe, the Supreme Court held that Congress did not, as it must, specifically waive the well-established tribal sovereign immunity from suit when it enacted the ICRA. Thus, no federal court action can be brought against a tribe for violations of the ICRA.

With respect to an ICRA suit against a tribal official, the Court held that the Act evidenced two congressional policies. One was to provide civil rights to individuals in their relations with tribal governments, while the other was to promote Indian self-determination. The Court reasoned that the goal of tribal self-determination would be frustrated if federal courts should be allowed to hear Indian complaints under the ICRA in a basically intra-tribal dispute. Tribal courts are the proper place to resolve such disputes.

The Court held that the only action permitted against a tribal official in federal court was an application for a writ of habeas corpus involving alleged unlawful detention, because that procedure is specifically allowed by the Act.

The Supreme Court's decision in Martinez is obviously highly favorable to tribal interests. The decision should greatly reduce the involvement of the federal courts in internal tribal affairs. It erases the growth of an entire body of Indian law under the ICRA developed since 1968. Tribal rather than federal courts will be responsible for the administration of the Indian Civil Rights Act, a result fully consistent with the goal of Indian self-determination.

Martinez will clearly have the effect of eliminating all further ICRA cases against tribes and officials, unless they are habeas corpus actions. Moreover, the Eighth Circuit Court of Appeals has held that Martinez applies to ICRA suits pending at the time of the Supreme Court's decision, thus eliminating these cases as well. Mousseaux v. Rosebud Sioux Tribe, No. 78-1414 (8th Cir., July 5, 1978).

The full impact of the Oliphant, Wheeler and Martinez decisions upon the scope of tribal sovereignty cannot, at this time, be determined with exactness. Subsequent litigation will undoubtedly explain and interpret these holdings in the context of different factual situations. Nevertheless, the following broad trends in the law appear to be indicated by the three decisions.

First and most importantly, the Supreme Court basically affirmed the tribal right to self-determination and self-government in applying its own laws to tribal members with respect to both criminal and civil matters. Wheeler held that tribal and federal governments constitute separate sovereigns which may both impose punishment upon tribal members for crimes committed within the reservation (provided the

offenses are not within the exclusive jurisdiction of the federal courts under the Major Crimes Act). Martinez indicates that tribal governments have extremely broad immunity from outside interference in enacting and enforcing their own civil laws as applied to tribal members. Martinez indicates that any disputes between the tribe and individual Indians arising under these laws are to be resolved in tribal courts. As applied to internal affairs of a Tribe, therefore, the Court has gone far in advancing Indian self-government and self-determination.

Second and unfortunately, the Supreme Court has made clear in Oliphant that Indian tribes do not have authority to punish non-Indians for crimes committed within reservation boundaries. It is unclear whether Oliphant applies only to non-Indians or whether it also precludes tribal criminal jurisdiction over Indians who commit a crime on a reservation but who are not tribal members. The law enforcement problems raised by Oliphant await resolution by a combination of administrative action, federal legislation, and perhaps tribal-state jurisdictional agreements.

Third, none of the Supreme Court opinions discussed above makes clear the extent of tribal jurisdiction over

non-members in civil matters such as the power to tax, to zone, to regulate business, mineral extraction, pollution, etc. Some light on these important matters may be shed by a number of the cases discussed in Parts II and III below. We believe that there are strong reasons to hold that a tribe has civil power over non-members, as a number of pre-Oliphant cases have held, and we are optimistic that tribes will ultimately prevail on this vital issue.

B. Other Cases

Several cases decided by lower courts are also important for issues relating to tribal sovereignty.

In White v. Califano, No. 1895 (8th Cir., July 10, 1978), the United States Court of Appeals for the Eighth Circuit held that the United States has the responsibility to pay for emergency in-patient mental health care provided to an indigent reservation Indian requiring involuntary commitment. The appellate court also held, however, that the state government (South Dakota) had no duty to provide the care.

The state defendants argued that they lacked jurisdiction to commit an Indian residing in Indian country to a state institution. The court agreed. It held that application of the state commitment procedures to a reservation Indian would infringe upon the rights of Indian people to govern themselves. Furthermore, the court held that the federal government had preempted the field of Indian health care thus precluding state jurisdiction.

Because the decision in White v. Califano appears to indicate that state governments can provide a lesser degree of health care to Indians than that due to other citizens of a state, it has been the subject of some concern. One possible solution to the problems may be voluntary jurisdictional agreements between tribes and states which would provide for handling such matters. The NCAI, the NTCA and the National Conference of State Legislatures (NCSL) have recently formed a Commission on State/Tribal Relations in order to explore possible solutions to problems such as those raised in White v. Califano. In addition, hearings have been held on a congressional bill, the "Tribal-State Compact Act of 1978" (H.R. 11489,

S. 2502) which would encourage tribal-state jurisdictional agreements to resolve problems which arise in cases such as White v. Califano.

In Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978), the Eighth Circuit upheld the authority of the Oglala Sioux Tribal Court of the Pine Ridge Indian Reservation to make a division of trust property in a divorce action in which both parties were tribal members. The Eighth Circuit held that the Oglala Sioux Tribe had retained its authority to regulate the marital relations of its members and further held that the tribal court had power to adjudicate controversies involving the marriage relationships of its members. The Eighth Circuit then held that neither the General Allotment Act nor the Indian Reorganization Act precluded the tribal court from making a division of trust property in a divorce action between tribal members. Because it affirms the jurisdiction of the tribal court over the divorce and property settlement in question, the Conroy case supports the principles of Indian self-government and self-determination. The case is favorable to Indian interests.

On February 27, 1978, the United States Supreme Court noted that it had probable jurisdiction to hear the appeal in Confederated Bands & Tribes of the Yakima Nation v. Washington, 552 F.2d 1332 (9th Cir. 1977).

The Ninth Circuit Court of Appeals had struck down the State of Washington's assumption of Public Law 280 jurisdiction over the Yakima Indian Reservation, principally on the ground that when a state assumes such jurisdiction without the consent of the Indians on the reservation, it must do so on a reservation-wide basis. The State of Washington had assumed full jurisdiction over fee land on the Reservation, but on trust land it had only assumed jurisdiction over certain subject matters (motor vehicles, divorce, juveniles, etc.), which the Ninth Circuit said voided the entire statute.

It is very important that in this case (1) there was no tribal consent to state jurisdiction, and (2) the state did not assume reservation-wide jurisdiction over all subject matters. In its order stating that it would hear the appeal, the Supreme Court directed the parties to address the following issue: "Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the

Yakima Indian Reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

This is an important case for Indian tribes whose reservations are located in states which have assumed partial Public Law 280 jurisdiction. It should be watched closely. The Supreme Court will hear argument and decide the case sometime after October 1978.

III. Indian Taxation: The Power of Tribes to Tax Non-Indians; the Power of the States and the United States to Tax Indians

There have been important developments during the past year in all three major areas of Indian taxation -- the authority of the states to tax Indians, the authority of the federal government to tax Indians, and the taxing authority of tribes. We will discuss each in turn.

A. The Authority of States to Tax Indians

Most of the new cases have arisen in this area which, you may recall, has been dealt with in four fairly

recent Supreme Court decisions -- McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976); and Bryan v. Itasca County, 426 U.S. 373 (1976). In McClanahan the Court held that Arizona did not have jurisdiction to collect state income taxes from a Navajo Indian living and working on the Navajo Reservation. In Mescalero, the Court upheld a New Mexico gross receipts tax on a tribal ski resort on off-reservation leased land, but struck down a state use tax on improvements, permanently affixed to the land, used in connection with the ski resort. In Moe, the Court held that Indians residing on the Flathead Reservation were exempt from the Montana personal property tax and the cigarette sales tax, but that the state could require an Indian cigarette seller to precollect the cigarette tax from non-Indian purchasers. In Bryan, the Court held that Public Law 280 did not give states the right to tax reservation Indians.

The cases decided in the past year have elaborated upon these Supreme Court decisions. In Dillon v. Montana, 451 F. Supp. 168 (D. Mont. 1978), the United States District

Court for the District of Montana dealt with the question of where an Indian had to live in order to receive the exemption from state income taxes for reservation income upheld in McClanahan. The court held that income earned on a reservation by Indians living on that reservation, even if they were not tribal members, was exempt from state taxation as long as the Indians possessed some Indian blood, were recognized as an Indian by their community, and were enrolled members of some federally recognized tribe or otherwise eligible to be recognized as an Indian ward of the government. However, income earned on a reservation by Indians living off the reservation, even if they were tribal members, was held to be subject to state taxation. We are informed that the State of Montana plans to appeal the Dillon case, so it is unclear whether it will stand as the final word on the interpretation of McClanahan. It should be noted, however, that the Supreme Court of Montana this month reached the same result as the federal court with respect to the Ft. Peck and Ft. Belknap Reservations in Boxer v. State Dept. of Revenue.

On the somewhat related issue of state personal property taxes, an Indiana federal court held in Swimming Turtle v. Miami County Board of County Comm'rs, 441 F. Supp. 374 (N.D. Ind. 1977), that a tract of land owned by an Indian

in fee simple was exempt from state property taxes by virtue of the tax exemption in Article III of the Northwest Ordinance. The court reasoned that the Indian had made "every reasonable effort to maintain his status as an Indian" and the tract of land had been passed down in his family for generations. The court said that the tax exemption was a vested property right which could not be taken by the state without payment of just compensation. This case is significant because of the fee simple status of the land. Other courts have upheld the tax exemption only while the land remained in trust status.

On the subject of state property taxes, it should also be noted that the Eastern Band of Cherokee Indians filed suit in federal court on March 1, 1978, to enjoin the State of North Carolina from applying its personal property tax to tribal members living on the reservation.

In what may, if upheld, prove to be a fleshing out of the Supreme Court's Mescalero case, the federal district court in New Mexico held in Mescalero Apache Tribe v. O'Cheskey, 439 F. Supp. 1063 (D.N.M. 1977), that the state could impose its gross receipts tax upon money received by non-Indian contractors performing construction services on the reservation,

but not upon money paid by the Tribe to the construction company to purchase materials for the project. The court reasoned that the construction company was receiving money on its own behalf for the construction work, but was simply acting as the Tribe's agent in purchasing materials.

In three cases decided this year dealing with the Moe cigarette tax issues, the courts have generally upheld the Indian position. In Ute Tribe v. State Tax Comm'n of Utah, 574 F.2d 1007 (10th Cir. 1978), the Tenth Circuit upheld the tribal position that the State of Utah could not impose its sales tax on sales by the Tribe to Indians on both fee and trust lands within the boundaries of the Uintah and Ouray Reservation. However, as in Moe, the court held that the tax did apply to sales to non-Indians on the Reservation.

In Vending Unlimited, Inc. v. Florida, No. 77-1933 (Circuit Ct. for Leon County, March 3, 1978), a Florida trial court held that an Indian selling cigarettes on the Seminole Reservation did not have to collect the state excise tax on sales to non-Indians. The court distinguished Moe, which did require the Indians to collect the tax, by saying that in

Montana (where the Moe case was brought) state law imposed the tax upon the buyer so that if he was a non-Indian, the tax had to be collected. Under Florida law, however, the tax was imposed upon the seller. Therefore, since the seller was an Indian, the tax did not apply. This case is presently on appeal.

In perhaps the most significant post-Moe case, a three-judge federal court in the Eastern District of Washington held that the State of Washington (which is a Public Law 280 state) could not impose its cigarette tax upon sales by Indians to non-Indians on the reservation. The case, Confederated Tribes of the Colville Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978), involved the Colville, Lummi, Makah and Yakima Tribes, each of which had enacted a comprehensive cigarette taxing program of its own and had its own cigarette stores.

The court held:

> "[W]here an Indian tribe exercises delegated authority in the implementation of a federal policy and the result is a tribal ordinance which conflicts with an otherwise valid state statute, the state statute is preempted."

The court went on to say that under the Indian Reorganization Act of 1934 a tribe was authorized to enact taxing statutes such as the tribes had enacted here, and this constituted the exercise of delegated power. Consequently, the tribal taxing program preempted the state taxing program insofar as it applied to sales by Indians on Indian reservations. The court added that even tribes not organized under the Indian Reorganization Act had authority, recognized by Congress, to enact taxing statutes. Therefore, even these tribes' taxing programs would preempt state taxing programs on the reservation.

The court also upheld the Indian tax exemption on a second ground. It held that the state's cigarette taxing program constituted an interference with tribal self-government when applied to non-Indians purchasing cigarettes from tribal dealers on the reservation. The court reasoned that if the state were allowed to tax these cigarettes, then the tribal revenue would dry up and the tribe would not be able to finance important tribal programs.

The court distinguished the Moe case on the ground that in Moe the cigarettes were sold by individual Indians operating businesses and not by tribal enterprises. The court

noted that there was no indication in Moe that the sales of cigarettes were tribally financed, managed, or regulated.

The court also held that the state's motor vehicle excise taxes were invalid as applied to vehicles kept on the reservation and owned by the tribe for its reservation-resident members, even though used partially off the reservation.

The court did, however, hold that the state sales tax could be applied to sales made to non-Indians by the tribe's non-cigarette enterprises (furniture, boat, and housing unit component manufacturing, Indian arts and crafts, fish and food processing, and newspaper distributing). The court stated that the tribes had failed to prove either that application of the sales tax had been preempted by tribal sales tax programs or that such a tax was significant enough to be an interference with tribal government.

We understand that the State of Washington may appeal the Colville decision. Since the case involved a three-judge court, the Supreme Court would automatically review it.

The number of Supreme Court decisions in the area of the states' authority to tax Indians has largely defined

the very limited power states have in this area. The Colville case, if upheld, indicates that tribes can eliminate most of the states' remaining power to tax by enacting comprehensive taxing and regulatory programs of their own.

B. The Taxing Authority of Tribes

As discussed above, the Colville case shows that tribes may enact comprehensive taxing ordinances for their reservations. The principal question raised after the Oliphant decision, as we pointed out in Part I, is whether these taxing ordinances may be applied to non-Indians on a reservation. There have been two decisions on this issue during the past year, one before and one after Oliphant, and they reached opposite results.

In Merrion v. Jicarilla Apache Tribe, Nos. 77-292 and 77 343 (D.N.M., Dec. 29, 1977), the federal district court in New Mexico held in a pre-Oliphant decision that the Jicarilla Apache Tribe did not have authority to impose an oil and gas severance tax upon parties holding oil and gas leases on the reservation. The court ruled that insofar as executive order

reservations were concerned, this authority was granted to state and local governments under 25 U.S.C. § 398c (a mineral leasing statute), that the Jicarilla Tribe was not such a state or local government, that the authority to tax non-Indians was not granted to the tribes by the Indian Reorganization Act of 1934, and that the tribal tax constituted an unconstitutional burden upon interstate commerce.

This highly unfavorable and, in our opinion, poorly reasoned decision appears to be in conflict with a recent opinion of the Solicitor of the Interior Department to the effect that states have no authority to impose production taxes upon mineral leases executed under the 1938 Indian Mineral Leasing Act (25 U.S.C. §§ 396a-f). The case is being appealed by the Jicarilla Tribe.

In the only case on point since the Oliphant decision, the federal district court for Arizona held in Salt River Project v. Navajo Tribe, No. 78-352 (D. Ariz., July 11, 1978), that the Navajo Tribe did have authority to impose a possessory interest tax upon public utilities who owned and operated facilities on the reservation. The court stated that every court and commentator who had faced the issue had concluded

that the power to tax is one of the attributes of sovereignty retained by the Indians. The court pointed out that this right had not been withdrawn or limited by the Navajo Treaty of 1868. This decision is also likely to be appealed.

Another case raising these same issues has been brought by the Crow Tribe in the federal district court for Montana. The Tribe is seeking to enjoin the state's severance tax on coal removed from the reservation, arguing that the state lacks the power to impose such a tax and that the taxing power belongs to the Tribe.

The opposite results reached in the Jicarilla and Navajo cases illustrate not only that the issue of tribal taxing authority over non-Indians remains unsettled, but also that it may well be resolved differently for different tribes depending upon such things as the type of tax sought to be imposed, whether the reservation was established by executive order, and whether the tribe has adopted the Indian Reorganization Act.

C. The Authority of the Federal Government to Tax Indians

The leading case on the authority of the federal government to tax Indians is Squire v. Capoeman, 351 U.S. 1

(1956). It held that General Allotment Act trust allotments and the income derived directly therefrom are exempt from federal taxes. Since the Capoeman case, court decisions have primarily focused upon what type of income should be considered to be derived directly from trust lands. Courts have held tax exempt farming and ranching income, Stevens v. Comm'r, 452 F.2d 741 (9th Cir. 1971), an Indian's share of tribal mineral income, Big Eagle v. United States, 156 Ct. Cl. 665, 300 F.2d 765 (1962), rental and royalty income from the sale of minerals, United States v. Hallam, 304 F.2d 620 (10th Cir. 1962), Nash v. Wiseman, 227 F. Supp. 552 (W.D. Okla. 1963), and a bonus paid to an Indian for the right to drill for oil and gas on his trust allotment, United States v. Daney, 270 F.2d 791 (10th Cir. 1966).

During the past year two favorable decisions for Indians have been handed down by the courts on this issue. In the first case, Critzer v. United States, No. 134-75 (Ct. Cl. Trial Div. 1977), the trial division of the Court of Claims held that rental and operating income received by a noncompetent Indian from tourist businesses on trust land on the Eastern Cherokee Reservation was tax exempt. This case, which is being handled by our office, is on appeal and oral argument is scheduled for November 1978.

In the second case, United States v. Anderson, 442 F. Supp. 10 (D. Mont. 1977), the federal district court for Montana held that income received by a noncompetent Indian from ranching on leased trust lands was tax exempt. This decision is directly contrary to an earlier one, Holt v. Comm'r, 364 F.2d 38 (8th Cir. 1966), which held that income received from ranching on leased trust land was not exempt. Although the court in Anderson recognized that Holt and other cases had limited exempt activities to an Indian's own trust land, it reasoned that one of the purposes of the Indian Reorganization Act was to promote optimum use of Indian land resources and that this purpose could not be accomplished unless trust lands were consolidated into grazing units and made available for lease by tribal members. Like the court in Critzer, the Anderson court recognized that the taxation of the Indian's income would impede the government's objectives of encouraging efficient use of Indian lands, encouraging economic independence for Indians, and helping Indians develop to their maximum potential.

Both the Critzer and Anderson cases are on appeal, so it is too early to predict whether the broad policy reasoning in them can be relied upon in related situations.

As you can see from the foregoing analysis, there are likely to be a number of important decisions rendered on appeal in the coming year which will shape the law in the area of Indian taxation.

IV. Natural Resources: The Tribal Right to Manage, Develop and Conserve its Own Assets

A. Indian Water Rights

There have been relatively few decided cases this past year involving Indian water rights. On the last day of its just completed term, however, the Supreme Court of the United States decided two cases that relate to federal reserved water rights, but not Indian rights.

In United States v. New Mexico, 46 U.S.L.W. 5010 (July 3, 1978), the Supreme Court held that in creating the national forest system and enacting the Organic Administration Act of 1897, Congress only reserved waters for the national forests for limited purposes, namely, securing favorable conditions for water flows and furnishing a continuous supply of timber. The Court ruled that recreational, aesthetic,

wildlife preservation and stockraising were not purposes for which Congress reserved water rights for the national forests in 1897. So-called in-stream uses of water, such as needed to preserve fisheries, were not recognized by the Court as being purposes for the national forest reservations. By this decision, the Court has indicated that in looking at federal reserved water rights, it will examine closely the language of the documents which establish the reservations for which the water rights are claimed.

The decision does not bear directly upon Indian water rights because none were involved in the case. However, the Court did reconfirm the Winters Doctrine in the New Mexico case. If the Court's narrow reading of statutory language concerning federal reserved water rights should be applied in future Indian water rights cases, it would be unfortunate. This possibility will make it important to point out the distinctions between Indian water rights and federal water rights in any future cases.

In California v. United States, 46 U.S.L.W. 4997 (July 3, 1978), the Supreme Court held that the United States Bureau of Reclamation, seeking to appropriate unappropriated waters from the State of California for a federal reclamation project, is subject to some state-imposed conditions on the

use of water. The Court left for decision by the lower court which conditions the State might impose without infringing upon the congressional purpose in establishing reclamation projects.

California v. United States and United States v. New Mexico both reflect an extreme deference by the Court to state control of water rights, even those of the federal government. Both cases are clearly states' rights victories, and, to an extent, a setback for the authority of the federal government to avoid increased state control in administration and adjudication of water rights. What effect this may have upon the future administration and adjudication of Indian water rights remains for later cases to determine.

With respect to cases decided by lower courts, two opinions of this past year involving Indian water rights are worthy of note.

In United States & Pyramid Lake Paiute Tribe v. Truckee-Carson Irrig. Dist., Civil No. R-1987-JBA (D. Nev., Dec. 12, 1977), the district court dismissed a case by the United States and the Pyramid Lake Paiute Tribe seeking a decree that the Tribe's Winters Doctrine water rights were applicable

to preserve Pyramid Lake for fishery purposes. The court held that the United States and the Tribe were bound by an earlier decree as to water rights in the Truckee-Carson River that feeds Pyramid Lake. The court rejected a variety of arguments by the Tribe. An important claim of the Tribe was that the earlier decree resulted when the United States had a conflict of interest between a federal reclamation project on the river and the interests of the Tribe. The court held that the Reclamation Act of 1902 was superior congressional policy which authorized the Secretary of the Interior to put reclamation demands ahead of tribal rights despite the conflict of interest.

The court similarly rejected tribal arguments that (1) the earlier decree was void for lack of a specific congressional approval in violation of the Indian Non-Intercourse Act, and (2) that the decree lacked the consent of the Tribe in violation of the Indian Reorganization Act. In addition, the opinion emphasizes, in contrast to past Winters water rights cases, that there is a qualitative difference between the Winters rights attaching to a treaty-established reservation and those attaching to an executive order-established reservation, such as Pyramid Lake.

This decision is clearly a most unfavorable result and is perhaps most disturbing in its lack of sanctions for the United States actions in conflict-of-interest situations. The decision is currently on appeal to the Ninth Circuit and bears close watching.

In United States v. Bel Bay Community and Water Assoc., Civ. No. 303-7102 (W.D. Wash., March 3, 1978), the United States District Court for the Western District of Washington, held that the State of Washington lacked any authority to manage or control groundwater, even for non-Indians on fee land, within the exterior boundaries of the Lummi Indian Reservation. The court's reasoning makes it plain, moreover, that the State similarly lacks jurisdiction to manage or control surface water within the Reservation.

The court left unresolved the question of whether management of the water would be by the Secretary of the Interior or by the Tribe or by the two of them acting together. Also unresolved until a trial is held is the question of what, if any, water rights are held by a non-Indian successor to a former Indian allotment.

This decision, if it stands, appears to invalidate all water "rights" established on the Reservation by state

law. We believe that Bel Bay is correct and that it is based upon solid legal precedent.

The state has asked the district court to reconsider its Bel Bay decision in light of the Supreme Court's decision in Oliphant. The case thus may well provide an indication of how the courts will interpret Oliphant (a criminal jurisdiction case) in civil contexts, as well as how they will interpret United States v. California, discussed above.

There are many cases currently pending in various courts which will have an important effect upon Indian water rights. The Supreme Court has announced that it will hear oral argument on October 2, 1978 (at the beginning of its next term), in Arizona v. California on the motions to intervene filed by five Indian tribes with rights in the Colorado River and the joint motion of the states and the United States for entry of a supplemental decree.

The 1963 decision of the court in Arizona v. California is one of the most important decisions relating to Indian water rights. The court recognized there that the Winters Doctrine affirms the present as well as the future rights of tribes to water and also clearly extends the Doctrine to tribal reservations established by executive order. The decree entered by the court in 1964, based upon that opinion,

is now involved in these additional proceedings to determine the rights of the five tribes and other parties not adjudicated originally. The tribes seek intervention, claiming that conflicts of interest between the United States and the tribes make the tribes indispensable to further prosecution of the case.

Important Indian water rights cases involving many of the Indian reservations in every region of the western United States are pending in lower federal and state courts. The foregoing review has been a discussion of cases decided in the past year, but the many critical legal issues in dispute in the undecided cases will shape the future of Indian water rights.

B. Hunting and Fishing Regulation

During the past year several interesting hunting and fishing rights cases were decided with mixed results for Indian interests.

In State of Minnesota v. Forge, No. 122 (Minn. Sup. Ct., Oct. 14, 1977), appeal dismissed, 46 U.S.L.W. 3578 (March 21, 1978), the Supreme Court of Minnesota upheld the

constitutionality of an agreement between the Leech Lake Band of Minnesota Chippewa and the State of Minnesota for regulating fishing within the Leech Lake Reservation. Under the terms of the agreement, members of the Minnesota Chippewa Tribe were exempted from state regulation within the reservation as to fishing, hunting, trapping and the gathering of wild rice. The Band agreed to regulate the fishing activities of its members under its own conservation code and to prohibit commercial hunting and fishing. The state in turn agreed to collect a supplemental license fee from non-members for the benefit of the Band for the right to hunt, trap, and fish on the Reservation.

In United States v. Washington, 573 F.2d 1117 (9th Cir. 1978), the Court of Appeals for the Ninth Circuit held that federal courts had authority to enforce the Boldt decision (United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)), in light of persistent non-compliance therewith by the state and private parties. In a related proceeding, the Ninth Circuit dismissed appeals brought by the Puyallup and Nisqually Tribes and by the State of Washington from a decision of the district court

which held that pink and salmon fisheries lying wholly within reservation boundaries were subject to regulation by the district court. The Indians had asked the court to take this action dismissing the appeal.

In another related case, Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123 (9th Cir. 1978), the Ninth Circuit rejected yet another state attack upon the Boldt decision, this time on equal protection grounds, commenting that "the district court [Judge Boldt] has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."

In other cases Indian hunting and fishing rights did not fare as well. In Sac & Fox Tribe v. Licklider, 576 F.2d 145 (8th Cir. 1978), the Eighth Circuit held that the State of Iowa had jurisdiction to regulate hunting, fishing, and trapping by tribal members on a tract of land owned by the Tribe. The court held, however, that the tract constituted a reservation held in trust by the United States in face of a challenge thereto by the state.

In Cheyenne-Arapaho Tribes v. Oklahoma, No. Civ-75-0769-D (D. Okla., March 31, 1978), the district court ruled that the State of Oklahoma had jurisdiction to enforce its

fish and game laws with respect to both Indians and non-Indians on all land located within the 1869 boundaries of tribe's reservation which do not now constitute "Indian country." The court also held that Oklahoma had jurisdiction to enforce its fish and game laws against non-Indians in that portion of the 1869 reservation which now constitutes "Indian country." The court held that Oklahoma's fish and game laws applied to Indians within Indian country because the Tribe had not enacted federally approved fish and game regulations, but that Oklahoma's laws (as applied to Indians in Indian country) could only be enforced in federal court.

Finally, in United States v. State of Montana, CV-75-105-BLG (D. Mont. July 31, 1978), the United States District Court for Montana (Judge Battin) again held that the State of Montana owns the bed and banks of the Big Horn River and that the River is not held in trust by the United States for the benefit of the Crow Tribe. The district court also held that Montana has authority to regulate and is properly regulating hunting and fishing by non-Indians within the exterior boundaries of the Crow Reservation.

The case arose from an action brought by the United States and the Crow Tribe against the State of Montana,

the Montana State Fish and Game Commission, and various private parties, to quiet title to the bed and banks of the Big Horn River and to obtain a declaration of tribal regulatory authority over hunting and fishing within the Crow Reservation.

Most of the same issues had previously been before Judge Battin in the context of a criminal prosecution brought by the United States for trespass on Indian lands. In United States v. Finch, 396 F. Supp. 205 (D. Mont. 1975), the same district court had concluded that the bed of the Big Horn River was owned by Montana rather than by the United States as trustee for the Crow Tribe and thus held there was no criminal trespass.

Finch, however, was reversed by the United States Court of Appeals for the Ninth Circuit which concluded that the Crows were the beneficial owners of the bed of the Big Horn River and that the Tribe could regulate hunting and fishing within the Reservation. United States v. Finch, 548 F.2d 822 (9th Cir. 1976). The Ninth Circuit opinion was in turn vacated by the Supreme Court of the United States for technical reasons having nothing to do with the stream question. Finch v. United States, 433 U.S. 676 (1977).

Even though the Supreme Court did not consider the court of appeals holding on the merits, Judge Battin believes that the court of appeals decision was incorrect and that his own earlier decision in Finch was right, especially in light of the facts developed the second time around.

We continue to believe that the district court is incorrect and that the decision of the court of appeals in Finch is sound and will probably be followed when United States v. Montana is appealed, which the Crow Tribe has already decided to do.

Thus, hunting and fishing cases continue to remain a very active and complex subject for litigation. The outcome of such cases appears heavily dependent upon the specific treaties and historical facts involved in each case.

C. The Right of Indians to Recover Money Damages for Actions Affecting Trust Properties

There have been developments during the past year in two cases dealing with the right of Indians to recover damages for actions affecting their trust properties. The first case, which has significance for virtually all tribes

and individual Indians, is the Court of Claims case of Mitchell v. United States.

Attorneys for the Department of Justice have recently asked the Court of Claims to dismiss the Mitchell case on the grounds that the court has no authority to decide it. The case has been brought by over 1,400 individuals allottees owning trust interests in the Quinault Reservation, Washington, and by the Quinault Tribe. The Indians are claiming that the United States, through the Bureau of Indian Affairs, has mismanaged their forests, lands, and monies, and are seeking to recover money damages for this mismanagement.

The United States, through the Department of Justice, basically argues that Congress has not given the courts general authority to award money damages for claims for mismanagement of Indian trust property. If accepted by the court, the Justice Department's position would have severe consequences for the ability of individual Indians and tribes to secure monetary relief for the government's mismanagement of their trust lands and resources. It would mean that Indians would have to get special permission from Congress in most cases before they could present their claims.

We are counsel for the Quinault Allottees and the Quinault Tribe in this matter, and we have prepared a detailed reply to the arguments of the Department of Justice. Oral argument before the Court of Claims will be held on October 4, 1978, and a decision can probably be expected within three to six months thereafter.

Another interesting case dealing with trust land is Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978), which held that the Secretary of the Interior had discretion under the Indian Reorganization Act to accept the conveyance of land in trust which an Indian had previously owned in fee. Usually, the Secretary takes the land in trust when it is acquired by an Indian in the first instance.

The Eighth Circuit further held in Chase that the refusal of the City of New Town, North Dakota, to permit water and sewer hookups for the Indian's trust land interfered with the Indian's right to beneficial use of his land under federal law and thus stated a cause of action for damages under 42 U.S.C. § 1983 (a civil rights act). However, the court did not allow damages in this case because it said that city officials had no knowledge of the illegality of their actions and no racially discriminatory motive. Despite

the lack of a damage award in this instance, the decision will serve notice upon local government officials that similar actions in the future may subject them to damages.

V. Summary and Projections

As the above analysis shows, the past year has produced many important judicial decisions concerning Indian law. The results have been favorable, unfavorable and mixed from the standpoint of Indian interests.

The following paragraphs consist of our summary of important decisions and of our projections for future developments in the broad areas of law discussed above: tribal sovereignty, Indian taxation, and natural resources.

A. Tribal Sovereignty

The Supreme Court in its Martinez and Wheeler decisions basically affirmed the tribal right to apply its own laws to tribal members in both criminal and civil matters.

As applied to the internal affairs of a tribe, the trend of judicial decision appears highly favorable to Indian self-government and self-determination.

With respect to tribal jurisdiction over non-Indians, the Supreme Court held in Oliphant that Indian tribes do not have criminal jurisdiction over non-Indians for crimes committed within reservation boundaries. The extent of tribal civil jurisdiction over non-members is unclear. While the law is uncertain at this point as a result of the decisions in Oliphant and Wheeler we believe that there are strong reasons to hold that a tribe has civil power over non-members, and we are hopeful that tribes will ultimately prevail on this vital issue.

Closely related to the issue of tribal sovereignty is the issue of whether, and under what circumstances, the opening of a reservation to settlement constitutes a disestablishment of the reservation. You may recall that in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the Supreme Court held that the opening to settlement of the Rosebud Sioux Reservation in South Dakota by a series of congressional statutes disestablished that portion of the Reservation so opened. The Court's decision appeared to be based on the specific historical facts concerning the Rosebud Sioux

Reservation. In applying the Rosebud case to other reservations, courts have gone both ways in determining whether the reservation was disestablished or merely opened to settlement. For example, in United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977), and in United States v. Weddell, 567 F.2d 768 (8th Cir. 1977), the Eighth Circuit held that the Standing Rock Indian Reservation, North and South Dakota, was not diminished by congressional statutes opening it to settlement. In United States v. Dupris, No. 30056-01 (D.S.D., June 29, 1978), the United States District Court for the District of South Dakota held that the Cheyenne-River Sioux Reservation, South Dakota, had been diminished by statutes opening it to settlement. This case is currently on appeal to the Eighth Circuit.

Thus, no hard and fast rules can be given for determination of the circumstances in which the opening of a reservation to settlement will be held to constitute disestablishment. Painstaking factual and historical analysis is critical to the resolution of this issue in a satisfactory manner for any reservation in which this issue is called into question.

B. Indian Taxation

In the taxation area the trends may generally be summarized as follows:

1. The Authority of States to Tax Indians

The Dillon and Boxer cases appear to suggest that income earned on a reservation by Indians living off the reservation will be subject to state taxation.

The ability of states to tax sales of cigarettes to non-Indians on a reservation is likely to depend upon (a) whether the sales are made by tribes or individual Indians, (b) whether state law imposes the tax upon the buyer or the seller, and (c) whether a tribe has enacted a comprehensive taxing ordinance of its own covering cigarette sales. The last factor, if upheld, is the most important because it will enable tribes to virtually eliminate the states' remaining power to impose such taxes on the reservations.

2. The Taxing Authority of Tribes

The extent of tribal authority to tax non-Indians awaits judicial determination. Tribal authority to tax non-Indians on a reservation is likely to depend upon the type

of tax sought to be imposed, whether the reservation was established by executive order, whether the tribe has adopted the Indian Reorganization Act, and other related facts.

3. The Authority of the Federal Government to Tax Indians

The extent to which Indian income from trust lands is subject to federal income tax is likely to continue to be dependent upon the nature of the activity producing the income. We hope that the ultimate decision in the Critzer case, however, will recognize that certain uses consistent with the inherent attributes of the land, other than merely farming, ranching, timber harvesting, and mining, will be recognized as tax exempt.

C. Natural Resources

1. Water Rights

The decisions of the Supreme Court in United States v. New Mexico and California v. United States reflect an extreme deference by the Court to state control of water rights, even those of the federal government. Both cases are clearly states' rights victories and, to an extent, a setback for the authority of the federal government to avoid increased state

control in administration and adjudication of water rights. It must be stressed, however, that Indian water rights were not at issue in the New Mexico and California cases. The effect, if any, which these cases may have upon Indian water rights remains for later cases to determine.

Important Indian water rights cases involving many of the Indian reservations in every region of the western United States are pending in lower federal and state courts. The many critical legal issues in dispute in the undecided cases will shape the future of Indian water rights.

2. Hunting and Fishing Regulation

During the past year, several cases were decided dealing with the respective authorities of tribal and state governments to regulate hunting and fishing by both Indians and non-Indians. In some cases, the tribal right to regulate hunting and fishing was upheld while in other cases state governments were given broad regulatory authority over hunting and fishing. Indian hunting and fishing rights have been and will continue to be an active and complex subject for litigation. The outcome of such cases appears heavily dependent upon the specific states and historical facts involved in each case.

3. The Right of Indians to Recover Money Damages for Actions Affecting Trust Properties

In Mitchell v. United States over 1,400 individual allottees owning trust interests in the Quinault Reservation, Washington, and the Quinault Tribe are seeking to recover money damages for the United States alleged mismanagement of their forests, lands and monies. The United States has asked the Court of Claims to dismiss this suit on grounds that Congress has not given the courts general authority to award money damages for claims for mismanagement of Indian trust property. If accepted by the court, the government's position would have severe consequences for the ability of individual Indians and tribes to secure monetary relief for the government's mismanagement of their trust lands and resources. It would mean that Indians would have to get special permission from Congress in most cases before they could present their claims.

We are counsel for the Quinault Allottees and the Quinault Tribe in this matter, and we have prepared a detailed reply to the arguments of the Department of Justice. Oral argument before the Court of Claims will be held on October 4, 1978, and a decision can probably be expected within three to six months thereafter.

VI. Recommendations and Conclusions

The development of law through litigation is necessarily an ongoing and continual process. Rarely will the holding of a particular case be applicable directly and at all times to all factual situations and circumstances that appear somewhat analogous to it. The result in almost every case is heavily dependent upon the specific factual situation at issue and the relevant legal principles. Other more intangible factors such as the disposition of the court hearing or reviewing the case and the political climate of the country may also be important to the eventual decision. The holdings of past cases are frequently interpreted, expanded upon, modified or restricted in a subsequent case as a result of these and other factors.

Given the case-by-case method of litigation and the precedential value which a case brought by one Indian group may have upon other Indians, it is highly desirable that communication be maintained among the various Indian groups and their attorneys which have or are considering litigation. In this way, it may be possible to bring the strongest cases from a factual and legal standpoint to the courts and to establish the most favorable precedents for subsequent decisions. The exchange of opinions and ideas which

may result from such communication could also be helpful in presenting the Indian case in the strongest possible manner.

We believe that litigation sessions, such as that for which this paper has been prepared, conducted for representatives of various Indian tribes are helpful in providing knowledge to the Indian community of the status of litigation. These sessions should be continued and expanded in order that each Indian group may have a fuller understanding of other cases which may affect it. We further believe that it is difficult to overestimate the value of competent and experienced legal counsel in advising of the desirability of bringing a particular case to trial, in presenting the facts of the case in the strongest and most thorough manner, and in analyzing and applying the relevant legal precedents in order to maximize the possibilities of a favorable resolution of the issues in question in a particular case.

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